UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

UNITED STATES OF AMERICA,	)	
	)	
v.	)	*Criminal No. 91-40-P-H*
	)	
RAMON CARMEN VERONA,	)	
	)	
Defendant	)	

RECOMMENDED DECISION ON DEFENDANT'S MOTION FOR DEPORTATION PURSUANT TO I.N.S. § 242(h) [sic] AS AMENDED IN 8 U.S.C. 1252(h)(2)(a) [sic]

The defendant, appearing pro se, moves this court to issue an order of immediate deportation, or, in the alternative, to reduce his sentence by two levels under the United States Sentencing Commission Guidelines. I recommend that the court deny the motion.

I. Factual Background

The defendant pleaded guilty, without a plea agreement, to one count of conspiracy to possess with intent to distribute cocaine, in violation of 21 U.S.C. §§ 841 and 846, and three counts of distribution of cocaine and aiding and abetting the distribution of cocaine, in violation of 21 U.S.C. § 841 and 18 U.S.C. § 2. Judgment (Docket No. 17) at 1; Letter of John F. Lambert, Jr. to Hon. D. Brock Hornby dated June 29, 1992 (Docket No. 16) at 2. He was sentenced on June 29, 1992 to a term of imprisonment of 121 months. Judgment at 1-2. The judgment includes a requirement that he be deported upon completion of his term of imprisonment. *Id*. at 3. The total offense level

determined under the United States Sentencing Commission Guidelines for purposes of sentencing was 32, and the defendant was sentenced to the shortest term available under the applicable guideline range. Memorandum of Sentencing Judgment (Docket No. 18) at 2.

II. Discussion

The defendant states that he "is now willing to waive his right for deportation hearing before the immigration Judge." Defendant's Motion for Deportation Pursuant to I.N.S. § 242(h) [sic] as Amended in 8 U.S.C. 1252(h)(2)(a) [sic] ("Defendant's Motion") (Docket No. 33) at [1]. Therefore, he contends, he is entitled to immediate deportation under 8 U.S.C. § 1252(h)(2)(A), a nonexistent subsection of that statute, or a two-level downward departure in his total offense level, with a resulting reduction in his sentence. He relies on an unreported order, a copy of which he does not provide, of a federal court in Miami, Florida dated March 7, 1998, and *United States v. Smith*, 27 F.3d 649 (D.C.Cir. 1994), to support his requests. The First Circuit has indicated that unpublished opinions are never to be cited in unrelated cases, either in the district court or on appeal. *Bachelder v. Communications Satellite Corp.*, 837 F.2d 519, 523 n.5 (1st Cir. 1988). Practice in this court must be bound by that directive. *See People's Heritage Sav. Bank v. Recoll Management, Inc.*, 814 F. Supp. 159, 163 n.8 (D. Me. 1993). Accordingly, the unreported order will not be considered in connection with this decision.

A. Immediate Deportation

The statute to which the defendant refers, 8 U.S.C. § 1252(h)(2)(A), was created by section 438 of the Antiterrorism and Effective Death Penalty Act of 1996, P.L. 104-132, 110 Stat 1214. It was recodified at 8 U.S.C. § 1231(a)(4)(B) by P.L. 104-208, § 305(a), 110 Stat 3009-599. It

provides, in relevant part:

> The Attorney General is authorized to remove an alien in accordance with applicable procedures under this chapter before the alien has completed a sentence of imprisonment —
>
> > (i) in the case of an alien in the custody of the Attorney General, if the Attorney General determines that (I) the alien is confined pursuant to a final conviction for a nonviolent offense (other than an offense related to smuggling or harboring of aliens or an offense described in section 1101(a)(43)(B), (C), (E), (I), or (L) of this title and (II) the removal of the alien is appropriate and in the best interest of the United States . . . .

8 U.S.C. § 1231(a)(4)(B). A later subsection of this statute provides: "No cause or claim may be asserted under this paragraph . . . to compel the release, removal, or consideration for release or removal of any alien." 8 U.S.C. § 1231(a)(4)(D).

The government contends that this court is without jurisdiction to entertain the plaintiff's motion on this ground. I agree.

Whether construing original section 1252(h)(2)(A) or recodified section 1231(a)(4), courts have uniformly held that there is no private right of action to seek deportation of an alien before completion of his sentence. *E.g., United States v. Marin-Castaneda*, 134 F.3d 551, 556 (3d Cir. 1998) (section 1231(a)(4)); *Thye v. United States*, 109 F.3d 127, 128 (2d Cir. 1997) (section 1252(h)(2)(A)); *Chacon-Castellanos v. Reno*, 943 F. Supp. 26, 28 (D.D.C. 1996) (same); *United States v. Adan-Torres*, 935 F. Supp. 1102, 1103 (D. Nev. 1996) (same). This court thus lacks jurisdiction to grant the relief sought by the defendant.[1]

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[1] The defendant also contends that neither the current version of section 1231(a)(4) nor replaced section 1252(h)(2)(A) should apply to his request because they were enacted after he was sentenced and cannot be applied retroactively. Memorandum of Law, attached to Defendant's Motion, at [1]. If that is the case, the applicable statute is the version of section 1252(h) that existed prior to the Antiterrorism and Effective Death Penalty Act, which provided: "An alien sentenced to (continued...)

B. Reduction in Sentence

In *Smith*, upon which the defendant relies, the District of Columbia Circuit held that downward departure from the recommended range under the United States Sentencing Commission Guidelines may be appropriate if the defendant, solely due to his status as a deportable alien, "faces the prospect of objectively more severe prison conditions than he would otherwise." 27 F.3d at 650. The defendant contends that the more severe condition in his case results from the fact that he "is not eligible for consideration in the residential drug program (CHOICE) in the Bureau of Prisons . . . even though he meets all the criteria for consideration for up to one (1) year off his sentence upon successful completion of the residential drug program." Memorandum of Law at [5]. He refers to 18 U.S.C. § 3621(e), which provides in general terms that every prisoner with a substance abuse problem should have the opportunity to participate in a substance abuse treatment program, and specifically that

> [t]he period a prisoner convicted of a nonviolent offense remains in custody after successfully completing a treatment program may be reduced by the Bureau of Prisons, but such reduction may not be more than one year from the term the prisoner must otherwise serve.

18 U.S.C. § 3621(e)(2)(B).

In *Smith*, the defendant's status as a deportable alien prevented him, under Bureau of Prisons policy, from being assigned for any part of his sentence to a minimum security facility, and the appellate court held that the sentencing court could determine whether that fact meant that the defendant's status clearly generated increased severity in his sentence such that a downward

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[1](...continued)
imprisonment shall not be deported until such imprisonment has been terminated by the release of the alien from confinement." Clearly, the defendant is not entitled to immediate deportation under this version of the statute.

departure in his sentence was appropriate. 27 F.3d at 651, 655. The government contends that the maximum 12-month reduction in the defendant's 121-month sentence allowed under the statute is not the type of "substantial" increase in severity contemplated in *Smith*. It is not necessary to reach this argument, both because *Smith* dealt with the options available to the trial court at the time of sentencing, and not with the power of a court to modify a sentence some six years after it was imposed, and because the defendant's argument fails on other grounds.

Courts addressing the defendant's argument directly have held that inmates subject to deportation upon completion of their sentences are not eligible for sentence reduction under section 3621(e)(2)(B). *Birth v. Crabtree*, 996 F. Supp. 1014, 1019 (D.Or.1998) (habeas corpus petition under 28 U.S.C. § 2241); *Londono v. Reese*, ___ F. Supp. 2d ___ , 1998 WL 513989, at *3-*4 (N.D.Cal. Aug. 7, 1998) (same). I find the reasoning of these courts to be persuasive. In addition, the only apparent jurisdictional basis for a claim made under the circumstances here other than that pursued by the defendants in *Birth* and *Londono* would be habeas corpus relief under 28 U.S.C. § 2255, or sentence modification under 18 U.S.C. § 3582. Any claim by this defendant under section 2255 is time-barred because more than one year has passed since the judgment of his conviction became final and more than one year has passed since that statute of limitations was imposed by the Antiterrorism and Effective Death Penalty Act, effective April 24, 1996.[2] *E.g., Burns v. Morton*, 134

[2] While the defendant's motion does not invoke section 2255, it could be interpreted at one point as raising an issue of ineffective assistance of counsel, a claim that is properly raised under that statute. *United States v. Tabares*, 951 F.2d 405, 409 (1st Cir. 1991). "[I]f counsel was an effective advocate defendant would have been serving a lesser sentence that [sic] he is now serving and 'the outcome would have been different.' Counsel should have requested a stipulated order fro[sic] deportation at the time of defendant's sentencing and plea agreement." Memorandum of Law at [4]. As previously noted, the defendant had no plea agreement. In any event, to the extent that a claim of ineffective assistance of counsel is asserted by the defendant, it is barred by the statute of (continued...)

F.3d 109, 111 (3d Cir. 1998); *United States v. Simmonds*, 111 F.3d 737, 745-46 (10th Cir. 1997). Under 18 U.S.C. § 3582(c), a sentence may be modified after imposition only upon motion of the director of the Bureau of Prisons or when the sentencing range upon which the defendant's sentence was based has subsequently been lowered by the Sentencing Commission. Neither circumstance is present here.

The defendant also seeks a reduction in his sentence based on a memorandum dated April 28, 1995 issued by the Attorney General of the United States. While the defendant appears to argue that this memorandum entitles him to immediate deportation, Memorandum of Law at [3], the memorandum in fact authorizes United States attorneys to recommend a departure below the applicable guideline sentencing range in return for an admission of alienage and deportability at the time of sentencing. *United States v. Clase-Espinal*, 115 F.3d 1054, 1056 (1st Cir. 1997). In addition to the obvious fact that this memorandum was issued several years after the defendant was sentenced, it applies by its terms to plea agreements, *United States v. Angel-Martinez*, 988 F. Supp. 475, 481 (D.N.J. 1997), and the defendant here, while he pleaded guilty, did not enter into a plea agreement. Nor did he offer his stipulation at the time of sentencing. Finally, the memorandum creates no enforceable right to such a recommendation. *Id*. at 482. The defendant is entitled to neither a downward departure nor immediate deportation on the basis of the Attorney General's memorandum.

III. Conclusion

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[2](...continued)
limitations included in section 2255.

For the foregoing reasons, I recommend that the defendant's motion for deportation be **DENIED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 2nd day of September, 1998.

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David M. Cohen
United States Magistrate Judge